

**FAMILY COURT AMENDMENT BILL 2019**

*Second Reading*

Resumed from an earlier stage of the sitting.

**MR S.A. MILLMAN (Mount Lawley)** [3.07 pm]: I was seeking to make eye contact with the member for Hillarys to confirm that he had concluded his comments before lunch. I thank the member for his contribution to this debate on the Family Court Amendment Bill 2019. I rise to make a brief contribution in support of this legislation. I wish to touch on only two points. The first is the way in which this legislative amendment serves to raise awareness of issues of family and domestic violence with a view to its prevention, and the way in which that awareness raising dovetails quite well with the 16 Days in WA to Stop Violence against Women campaign. That initiative comes as a direct consequence of the McGowan Labor government's appointment of the very first Minister for Prevention of Family and Domestic Violence. The second issue I hope to canvass this afternoon is what this bill does and, in particular, the cross-examination ban and the promotion of the use of legal advocates in our adversarial system. Members are unlikely to recall the contribution that I made on 27 November 2018 when we were discussing the Child Support (Commonwealth Powers) Bill.

**Mr P. Papalia:** One of your best!

**Mr S.A. MILLMAN:** Thank you, minister.

That bill was introduced in order to update the Western Australian legislation as it related to the operations of the commonwealth authority, the Child Support agency, to make sure that the Western Australian Parliament had the legislative framework to give effect to the national system. During that contribution, I recited some of the relevant history of the provisions of the commonwealth Constitution and the retention of the powers of the WA Constitution to make laws in respect of family law matters.

The reason I raise this issue is the concluding comments made by the member for Hillarys and the interjection made by the Treasurer, as the minister with carriage of this bill, about the referral of WA's family law powers. Leaving to one side the pros and cons of that particular endeavour, which I will not express an opinion on now but it is always something to continue the conversation on, it still remains the authority and responsibility of this Parliament to make sure that our family law provisions and the way that our Family Court operates are consistent with national standards—which brings me to the Family Court Amendment Bill. At about the same time as I was making that contribution on 5 December last year, the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018, which amended the Family Law Act to provide protections for victims of family violence during the cross-examination process in all family law proceedings, passed through both houses of federal Parliament. That was almost 12 months ago.

This bill will bring the Family Court of Western Australia civil procedure mechanisms up to date with the changes that have been made at a commonwealth level. It will do so by providing that parties, when possible, should obtain their own legal representation for the purposes of cross-examining other parties in Family Court proceedings when there are circumstances of family or domestic violence. The reason that this is an important initiative is the significant stress and distress that is occasioned by having to participate in adversarial court processes. The common law system, as distinct from the civil law system, is predicated on an adversarial process; that is, the two parties are largely responsible for the conduct of the court case. They are largely responsible for the conduct of the litigation, with a very soft touch applied by the curial officer, the judge or what have you who has oversight of the court process. That is distinct from what is seen in civil law jurisdictions, in which there is a much more inquisitorial approach and the judge has a much greater role to play in the way in which the litigation is conducted. The problem with that is that it puts a great deal of onus on each of the parties to bring forward and prosecute their cases. That problem is accentuated in circumstances in which parties are self-represented. Unfortunately, the incidence of self-represented litigants is on the rise, particularly in Family Court proceedings.

The problem that this legislation tries to address is the circumstances in Family Court proceedings when there are victims of family and domestic violence. But there is a precedent for the use of remedial mechanisms or beneficial mechanisms for witnesses who are required to give evidence in this sort of circumstance. We have had for a very long time provisions in our Supreme Court, District Court and Magistrates Court processes, particularly in criminal law proceedings, whereby a vulnerable witness can be declared so by the court and they can be allowed special protections. This is a very fine balancing act, because if members have regard to the adversarial system, they will recognise that the cross-examination process is an integral part of testing evidence in a proceeding and allowing a court to make findings of fact—evidence-based findings. Putting an end to victims being cross-examined by perpetrators will improve the ability of those victims to give clear and cogent evidence. Furthermore, the cross-examination of perpetrators by legal practitioners rather than by parties will ensure that the evidence is appropriately tested and therefore more reliable. The evidence is specific to the matters in issue between the parties. If a party has a legal representative who knows exactly what elements of the cause of action need to be established

to succeed in the prosecution of their case, it is much less likely that there will be a discursive cross-examination. The cross-examination will be narrow and focused and the witnesses will need to provide evidence only about those matters that are directly relevant to and directly on point in the proceedings. In the context of our adversarial system, in which the judge acts as a finder of fact, that is all to the good.

There is one more point that I want to raise, and this was also touched on by the member for Hillarys. Members will be aware that I have always been a strong advocate of the use of legal representatives in court proceedings, because they save money and the court's time and they allow the court to arrive at the important issues rather than intercede on behalf of one party or the other. For example, my advocacy for the funding for community legal centres and Legal Aid WA is all precisely on this point. One of the essential features of the regime that is currently up for discussion is that parties, when possible, should obtain their own legal representation; and, if a party is unrepresented, they will be advised to obtain representation and will also be referred to Legal Aid WA, which administers the commonwealth family violence and cross-examination of parties scheme. In support of this legislation, the commonwealth has established the scheme and it has provided funding for legal aid commissions across Australia. Legal Aid WA has received funding for this initiative in the first half of the funding allocation for 2019–20. That money is designed to allow for the cost of those unrepresented parties who are required to undertake cross-examination to obtain the necessary legal representation. That will lead to a more efficient operation of Family Court proceedings. What is interesting about this legislation is that it recognises that those vulnerable witness protections that already exist in our criminal jurisdiction can be translated across to our civil jurisdiction, particularly in the Family Court.

**Mr W.R. Marmion:** If one party gets legal aid, what happens if the other party does not have legal representation? How can they get legal aid?

**Mr S.A. MILLMAN:** The short answer is that I do not know the answer to that, but I suspect that it will depend on how the scheme operates. It will depend on the nature of the issue in dispute between the parties and whether the other party—this is going to get confusing—to the proceedings is also required to cross-examine the first party. My understanding of how the commonwealth funding scheme works is that if a party is required to cross-examine the other party, that party will be entitled to seek that representation. In those circumstances, with this mechanism to encourage parties to obtain legal representation, both parties should take the necessary steps. The eligibility for legal aid will depend on each person's particular pecuniary circumstances.

**Mr W.R. Marmion:** My understanding is that if both are eligible, and the first person gets in and gets it, but then the next person applies, it is too late because the first person has applied; is that right? I thought you might know.

**Mr S.A. MILLMAN:** I would be surprised if that was the outcome. That would be a strange outcome. The Legal Aid Commission does not just say that a party needs a legal aid lawyer; it also refers them to other legal service providers who might be able to provide the service. For the purposes of this debate, I should not be the one to answer that question. I think the minister or somebody else should answer that question to make it clear, so there is no confusion for practitioners in the operation of the scheme. I thank the member for the interjection; it was a good point.

The only other point that I wanted to make on the way the procedure operates is derived from the *National Domestic and Family Violence Bench Book*, which is a resource provided to judicial officers. A very useful table in that book summarises all of the existing provisions that provide protections for vulnerable witnesses. At the moment, the only protection that exists in WA is the protections provided for under the WA Evidence Act 1906, and that is for the classification of a special witness. This bill will bring the operation of this policy objective out of the criminal law jurisdiction and into the civil law jurisdiction via the Family Court.

Finally, I return to something that I mentioned earlier: what will be achieved by virtue of having this discussion in Parliament at this time? Right now, we are in the midst of the third annual 16 Days in WA campaign. It is an initiative that I would say is a direct consequence of the McGowan government instituting the state's very first Minister for Prevention of Family and Domestic Violence. It also highlights the efforts of the government in respect of family and domestic violence more generally. In that regard, I would refer members to the excellent article in *The West Australian* yesterday by Peter Law titled "Tables Turned on Fiends". An overhaul of the family violence laws was introduced by the Attorney General yesterday as part of the ongoing legislative reform that this government is engaged in. Although I commend the Attorney General, I think it is a real testament to the McGowan government. There is every indication that we will leave a lasting legacy for the state of Western Australia. I heard what the opposition had to say. We are on a unity ticket with regard to this. The opposition abhors family and domestic violence just as much as we do. One day, under a future Liberal government, perhaps led by the member for Dawesville in two or three terms, he will persist in having a Minister for Prevention of Family and Domestic Violence and just by changing the way the narrative runs —

**Mr P.A. Katsambanis:** Maybe we will not need one in the future.

**Mr S.A. MILLMAN:** Of course, member, that is the hope.

**Mr P.A. Katsambanis:** Sadly, we will.

**Mr S.A. MILLMAN:** Like so many other debates we have in this place, such as debates about road traffic accidents, workplace accidents and drug dealers, it is to the credit of the opposition that it supports this and other legislation that is driving towards important reforms. The opposition can see that this is a necessary reform to tackle what the Attorney General has described as an epidemic in our community. There is so much work still to be done. In having this debate at this stage, all we do is good work because we raise the profile of the issue in the community and we address what is an injustice in the system at the moment. We make the system fairer and more equitable and we make it easier for victims to obtain justice. With those comments, I conclude my contribution to the debate.

Debate adjourned, on motion by **Mr D.A. Templeman (Leader of the House)**.